

Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers (including the CMA's mergers intelligence function)

Consultation document

November 2020

CMA2con and CMA56con

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This publication is also available at www.gov.uk/cma.

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1. About the consultation

Introduction

- 1.1 The Competition and Markets Authority (CMA)¹ has set out in published guidance general information for the business and legal communities and other interested parties on its practices and processes in connection with its powers under the Enterprise Act 2002 (as amended) (the Act) to investigate mergers.²
- 1.2 One guidance publication, *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) sets out the CMA's procedures in operating the merger control regime set out in the Act and includes guidance on when the CMA will have jurisdiction to review mergers under the Act. It took effect from January 2014 and superseded various pieces of previous guidance issued by the CMA's predecessor organisations, the Office of Fair Trading (OFT) and the Competition Commission (the CC), as set out in Annex D to CMA2.
- 1.3 The CMA has also published *Guidance on the CMA's mergers intelligence function* (CMA56), which took effect from June 2016 and was updated in September 2017.
- 1.4 In this consultation document CMA2 and CMA56 are referred to collectively as 'the Current Guidance'.
- 1.5 As set out more fully below, the CMA is now proposing a number of amendments to the Current Guidance.³ The draft revised text of the Current Guidance issued alongside this consultation document is referred to as 'the Draft Revised Guidance'. This consultation document explains the nature of and the reasons for the amendments to the Current Guidance that are proposed in the Draft Revised Guidance.
- 1.6 As explained further below (see paragraph 4.14), after the consultation, we will decide whether to make the changes proposed in the Draft Revised Guidance and whether any further changes are necessary. Having done so,

¹ The CMA is the UK's economy-wide competition and consumer authority, and works to promote competition for the benefit of consumers, both within and outside the UK. Its aim is to make markets work well for consumers, businesses and the economy as a whole.

² This guidance forms part of the advice and information published by the CMA under section 106 of the Act.

³ Accordingly, references in the Draft Revised Guidance which refer to CMA2 should be read as references to the revised *Mergers: Guidance on the CMA's jurisdiction and procedure*, and references in the Draft Revised Guidance which refer to CMA56 should be read as references to the revised *Guidance on the CMA's mergers intelligence function*, both of which will be published in due course after this consultation.

and also taking into account the consultation we are intending to undertake separately on various proposed changes to the CMA's *Merger Assessment Guidelines* (OFT1254/CC2)⁴, we will update the CMA's *Quick guide to UK merger assessment* (CMA18) to reflect the final post-consultation versions of both CMA2 and OFT1254/CC2.

- 1.7 The Draft Revised Guidance reflects the legal position as at the date of this consultation.

Scope of the Consultation

- 1.8 This consultation seeks the views of interested parties on the CMA's proposed revisions to the Current Guidance in accordance with section 106 of the Act.
- 1.9 The specific questions on which we are seeking respondents' views are set out in section 5 in this consultation document.
- 1.10 This consultation is aimed at those who have an interest in the CMA's merger investigations under the Act. In particular, it may be of interest to businesses and their legal and other advisers.

Rationale for the amendments to the Current Guidance proposed in the Draft Revised Guidance

- 1.11 CMA2 was originally published in January 2014 prior to the establishment of the CMA in April 2014. It was intended to provide a comprehensive overview of the procedure applied in UK merger control, consolidating guidance on those functions which had been fulfilled by the Office of Fair Trading (OFT) and those functions which had been fulfilled by the Competition Commission (CC).
- 1.12 The CMA now proposes to update CMA2 for several reasons.
- 1.13 First, over the past six years there has been a series of developments affecting UK merger control (or which will affect UK merger control). These include:
- a) Changes to the legal framework concerning 'public interest mergers';
 - b) The CMA's decisional practice and court decisions have clarified the approach applied in various aspects of UK merger control proceedings;

⁴ Accordingly, references in the Draft Revised Guidance which refer to OFT1254/CC2 should be read as references to the revised *Merger Assessment Guidelines*, which will be published in due course.

- c) The prospect of mergers exclusively reviewable by the European Commission (under the “one-stop-shop” principle) being reviewed by the CMA as well as the European Commission after the ‘Transition Period’ comes to an end on 31 December 2020.⁵

1.14 Second, the CMA’s practice has evolved over time. In particular:

- a) The CMA has published new and/or updated guidance on several aspects of the UK merger control regime, including in relation to merger remedies, interim measures, requests for internal documents and the CMA’s mergers intelligence function (an updated draft of which the CMA is also consulting on as part of this consultation);
- b) The combination of the OFT and CC in forming the CMA has provided scope for greater efficiencies within the end-to-end process through which mergers are reviewed;
- c) The CMA has seen increasing cooperation and coordination with other international competition agencies in relation to multi-jurisdictional mergers (and expects the extent of such interactions to increase in future following the end of the Transition Period).
- d) The current version of CMA2 contains descriptions of aspects of a CMA investigation that do not reflect current practice in all cases. Moreover, while the Draft Revised Guidance seeks to provide an overview of all of the steps that can take place within a CMA merger investigation, it also makes clear that certain of these steps may not be used in all cases (given that the CMA will generally aim to conduct its investigations flexibly within the applicable legal framework in light of the circumstances of the transaction under review).

Structure of this consultation document

1.15 The following sections of this consultation document summarise the main proposed changes in relation to CMA2/CMA56.

1.16 We firstly set out the proposed changes to CMA2 in section 2. We then summarise the proposed changes to CMA56 in section 3. In section 4, we provide guidance on the consultation process itself. Finally, we set out several questions in section 5 on which we are seeking views as part of this consultation.

⁵ See *UK exit from the EU, Guidance on the functions of the CMA under the Withdrawal Agreement* (CMA113).

2. CMA commentary on proposed changes to CMA2

2.1 The principal proposed changes to CMA2 are set out below.

Chapter 4: Jurisdiction and relevant merger situations

2.2 In this chapter, the main proposed changes include:

- a) Updating the text to reflect amendments to the Act which have (i) introduced alternative jurisdictional thresholds (in addition to the existing jurisdictional criteria under the Act) for mergers in which the enterprise being taken over is a 'relevant enterprise' and (ii) subsequently expanded the definition of a 'relevant enterprise' (see paragraphs 4.4 to 4.7, 4.56 and 4.71 of the Draft Revised Guidance).⁶
- b) Updating the text on 'enterprises' to reflect developments since the adoption of the Current Guidance, including judgments of the Competition Appeal Tribunal (CAT) and Supreme Court, and the CMA's decisional practice (see paragraphs 4.10 to 4.19 of the Draft Revised Guidance).
- c) Updating the text on the ability to exercise material influence to reflect developments in the CMA's decisional practice since the adoption of the Current Guidance (see paragraphs 4.21 to 4.36 of the Draft Revised Guidance).
- d) Updating the text on time limits for reference decisions (in particular on when material facts are 'made public') to reflect developments since the adoption of the Current Guidance, including a judgment of the CAT and the CMA's decisional practice (see paragraphs 4.51 to 4.55 of the Draft Revised Guidance).
- e) Updating the text on the share of supply test to reflect developments in the CMA's decisional practice since the adoption of the Current Guidance (see paragraphs 4.62 to 4.70 of the Draft Revised Guidance).
- f) The inclusion of additional references to the CMA's decisional practice to help users of the guidance see how the principles in this chapter have been applied in practice.
- g) The removal of references to the EU Merger Regulation and relevant sections of the Act to reflect the UK's exit from the EU.

⁶ Annex A (Guidance on the calculation of turnover for the purposes of Part 3 of the Enterprise Act 2002) of the Draft Revised Guidance (Annex B of the Current Guidance) has also been updated accordingly.

Chapter 6: Notification of mergers to the CMA

2.3 In this chapter, the main proposed changes include:

- a) The removal of a detailed description of the operation of the CMA's mergers intelligence function, on the basis that the CMA has now published standalone *Guidance on the CMA's mergers intelligence function* (CMA56) (see further section 3 below).
- b) The removal of a detailed description of the procedure followed in relation to so-called "informal advice", given that it is rarely requested, and it is always open for merger parties to contact the CMA's mergers function to discuss any aspect of merger control.
- c) The inclusion of a new annex to CMA2 (annex C of the Draft Revised Guidance) setting out guiding principles in relation to ancillary restraints, which replaces a reference to the guidance on ancillary restraints issued by the European Commission.

Chapter 7: Fast track processes and "conceding" an SLC

2.4 This chapter sets out the process for so-called fast-track processes at phase 1 and for "conceding" an SLC at phase 2.

2.5 In relation to fast-track processes, we are proposing to include separate sections on the two different purposes for which cases can be fast-tracked at phase 1, namely, (i) to proceed more quickly to offering undertakings in lieu of reference (UILs), with the objective of reaching a phase 1 clearance with remedies⁷, or (ii) to proceed more quickly to an in-depth phase 2 investigation.⁸

2.6 For each of these processes, we are clarifying the typical changes to our normal investigatory steps (for example, reduced time for third-party consultation), as well as the formalities required from the merger parties (for example, an acceptance in writing that the test for reference is met).

2.7 The Draft Revised Guidance makes clear that a fast-track process for consideration of UILs is no guarantee that UILs will be accepted, and that certain cases may not be suitable for a fast-track process (of either type).

⁷ See paragraphs 7.7 to 7.12 of the Draft Revised Guidance.

⁸ See paragraphs 7.13 to 7.16 of the Draft Revised Guidance.

2.8 The Draft Revised Guidance also sets out how merger parties can concede the existence of an SLC in relation to certain markets in a phase 2 investigation (agreeing to waive their right to challenge that position during a phase 2 investigation).⁹ This is intended to facilitate the efficient conduct of our merger investigation processes; for example, where it would aid the alignment of the CMA's remedies process in other jurisdictions and/or where it would enable the CMA and merger parties to focus their substantive assessment on other areas.

Chapter 8: Interactions with other proceedings

2.9 The Draft Revised Guidance has been expanded to explain how the CMA may seek to take account of any merger control proceedings in other jurisdictions or other regulatory processes.

2.10 More specifically, the Draft Revised Guidance makes clear that, in deciding whether to open an investigation on its own initiative, the CMA may take into account any merger control proceedings in other jurisdictions.¹⁰ In particular, the CMA may decide not to open an investigation if any remedies imposed or agreed in those proceedings, would be likely to address any competition concerns that could arise in the UK (for example where all of the markets that are relevant to the transaction are broader than national in scope). In this circumstance, merging parties are invited to engage with the CMA at an early stage and may be invited to update the CMA on the progress of proceedings in other jurisdictions and to provide the necessary waivers to allow the CMA to discuss these proceedings with other competition authorities.

Chapter 9: The phase 1 assessment process

2.11 This chapter sets out the process followed in phase 1 investigations. While the key elements of the phase 1 process remain the same as those set out in the Current Guidance, the description of the process has been updated to reflect the CMA's current practice (and intended practice in future investigations). In particular, the text on information gathering has been streamlined to set out more clearly the main ways in which the CMA gathers information (including through formal oral interviews).¹¹

2.12 Explanations of the CMA's practice in relation to communicating and publishing decisions, and of our approach to the treatment of confidential information, have been moved to a new separate chapter in the Draft Revised

⁹ See paragraphs 7.17 to 7.20 of the Draft Revised Guidance.

¹⁰ See paragraphs 8.3 and 8.4 of the Draft Revised Guidance.

¹¹ See paragraphs 9.4 to 9.8 of the Draft Revised Guidance.

Guidance (chapter 19, Communication and publication of decisions, undertakings and orders), which covers both phase 1 and phase 2 proceedings.

- 2.13 Finally, detailed descriptions of the CMA's practice in relation to interim measures and UILs has been removed, on the basis that the CMA has now issued standalone guidance on *Interim measures in merger investigations* (CMA108) and *Merger remedies* (CMA87).

Chapters 11, 12 and 13: The phase 2 process

- 2.14 We have re-organised the core guidance concerning the phase 2 process into three chapters: chapter 11 (Phase 2 inquiries – key stages prior to provisional findings), chapter 12 (Provisional findings), and chapter 13 (After provisional findings) to set out the main parts of the phase 2 process more clearly.
- 2.15 As with the phase 1 process, the key elements of the phase 2 process remain the same as those set out in the Current Guidance, with the descriptions of the process being updated to reflect the CMA's current practice (and intended practice in future investigations).
- 2.16 In chapter 11 (Phase 2 inquiries – key stages prior to provisional findings), the main proposed changes include:
- a) Highlighting the formal nature of CMA proceedings and more precisely specifying the key points in the process at which merger parties are invited to make written submissions;¹²
 - b) Removing the requirement on merger parties to submit a 'non-confidential' version of any merger notice submitted at phase 1;
 - c) Clarifying the CMA's practice in relation to third-party evidence gathering (reflecting that the majority of oral third-party information-gathering takes place through case team engagement rather than more formal "hearings");¹³ and
 - d) Removing the detailed description of the CMA's practice in relation to interim measures (as above, on the basis that the CMA has standalone guidance on *Interim measures in merger investigations* (CMA87)).
- 2.17 In chapter 12 (Provisional findings), we have clarified the procedure that will be followed in the so-called 'put back' process (ie the process by which text

¹² See paragraphs 11.12 to 11.14 of the Draft Revised Guidance.

¹³ See paragraph 11.23 of the Draft Revised Guidance.

from draft working papers and/or draft provisional findings is sent to parties to verify whether the text is factually accurate and/or to identify potentially confidential information).

- 2.18 The Draft Revised Guidance makes clear that the CMA will typically not ‘put back’ draft text to parties to verify factual accuracy where the draft text is taken from information already provided to the CMA, whether in phase 1 or in phase 2 – for example, from previous written submissions, responses to written questions, or from agreed notes of oral evidence. In these circumstances, put back will be limited to the purpose of identifying potentially confidential information (to the extent parties have not previously been given the opportunity to indicate whether or not the information may be confidential).¹⁴
- 2.19 Chapter 13 (After provisional findings) provides additional information in relation to how the CMA will typically carry out its statutory duty to consult any party whose interests are likely to be adversely affected by the CMA’s proposed decision on the outcome of a merger and to give reasons for that proposed decision.¹⁵
- 2.20 The Draft Revised Guidance makes clear that the provisional findings are typically the means by which the CMA fulfils this duty (and that there is no general right of ‘access to file’ within CMA merger control proceedings). The Draft Revised Guidance also explains the CMA’s likely practice where it considers that it is required to disclose additional confidential material as part of the ‘gist’ of the case.¹⁶

Chapter 16: Public Interest Mergers

- 2.21 In this chapter, the main proposed changes include:
- a) Updating the text to reflect amendments to the jurisdictional thresholds in the Act which enable the Secretary of State to intervene in certain transactions (see paragraph 2.2(a) above).
 - b) Updating the text to reflect the changes introduced by the UK government in 2020 to introduce a new consideration to intervene in mergers on public interest grounds in relation to public health emergencies.

¹⁴ See paragraph 12.8 of the Draft Revised Guidance.

¹⁵ Section 104 of the Act.

¹⁶ See paragraphs 13.4 to 13.15 of the Draft Revised Guidance.

- c) Including additional references to the CMA's decisional practice where the Secretary of State has issued a PIIN since 2014 to help users of the guidance see how the PIIN regime has been applied in practice.
- d) Removing references to the European Intervention Notice regime to reflect the UK's exit from the EU.

2.22 Given the proposed changes to this chapter of CMA2, we propose to withdraw *Guidance on changes to the jurisdictional thresholds for UK merger control* (CMA90).

Chapter 18: Multi-jurisdictional mergers

2.23 This chapter is intended to bring together some of the considerations that are likely to apply in mergers that qualify for merger control review in more than one jurisdiction (referred to as 'multi-jurisdictional' mergers).

2.24 The chapter sets out the CMA's general approach to engagement with other competition authorities. The chapter also explains how engagement with other authorities can impact on the CMA's approach to the investigation of multi-jurisdictional mergers.

3. CMA56 – CMA commentary on proposed changes

- 3.1 The proposed amendments to the CMA's *Guidance on the CMA's mergers intelligence function* (CMA56) reflect the current approach of the CMA's mergers intelligence function, as well as how the UK's Exit from the European Union will affect its processes.
- 3.2 The revised draft of CMA56 provides additional detail on the information-gathering practice of the CMA's mergers intelligence function. It also clarifies the interaction between the CMA's mergers intelligence process and the City Code governing public takeovers, making clear that the CMA may now be willing to consider a briefing note prior to a signed merger agreement where the acquirer is able to demonstrate the binding nature of the offer that has been made.
- 3.3 In keeping with the general principle set out in paragraph 2.10 above, the revised draft of CMA56 makes clear that one circumstance in which the CMA might decide not to open an investigation immediately is where a transaction is subject to review by a competition authority outside the UK and any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK. As noted above, in this circumstance, merging parties are encouraged to engage with the CMA at an early stage, and may be invited to update the CMA on the progress of proceedings in other jurisdictions and to provide waivers to the CMA to discuss these proceedings with other competition authorities.

4. Consultation process

How to respond

- 4.1 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We welcome your comments on the changes to the Current Guidance that are proposed in the Draft Revised Guidance.
- 4.2 Please provide supporting evidence for your views where appropriate. We encourage you to respond to the consultation in writing (by email) using the contact details provided in paragraph 4.6 below.
- 4.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 4.4 In pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and explain why you regard it as sensitive at the same time (see further paragraphs 4.8 to 4.13 below).

Duration

- 4.5 The consultation will run from Friday, 6 November 2020 to Friday, 4 December 2020.

Contact details

- 4.6 Responses should be submitted by email by no later than 5pm on 4 December 2020 and should be sent to:

MergersProceduralGuidance@cma.gov.uk

Compliance with government consultation principles

- 4.7 In preparing this consultation, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

Statement about how we use information and personal data that is supplied in consultation responses

- 4.8 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 4.9 We are processing this personal data for the purposes of our work. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account and to ensure that we properly consult on the Draft Revised Guidance, before it is finalised and issued.
- 4.10 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Privacy Notice.
- 4.11 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 4.12 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration any representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under Part 9 of the Enterprise Act 2002.
- 4.13 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

After the consultation

- 4.14 After the consultation, we will decide whether to make the changes proposed in the Draft Revised Guidance and whether any further changes are necessary.
- 4.15 We will publish the final version of the Draft Revised Guidance on our webpages at <http://www.gov.uk/cma>. We will also publish a summary of the responses received during the consultation. These documents will be available on our webpages and respondents will be notified when they are available.

5. Questions for consideration

- 5.1 The Draft Revised Guidance is intended to set out the CMA's procedures in operating the merger control regime set out in the Act, including guidance on when the CMA will have jurisdiction to review mergers under the Act.
- 5.2 To that end, the CMA would encourage stakeholders to consider whether the Draft Revised Guidance is sufficiently comprehensive and whether it has any significant omissions.
- 5.3 The CMA would also welcome the views of stakeholders on any other aspects of the Draft Revised Guidance.